IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE GUINDON, et al.	)	
	)	
Plaintiffs,	)	
	)	
V.	)	C.A. No. 03-335-L
	)	
AMERICAN FOAM CORP., et al.,	)	
	)	
Defendants	)	

DEFENDANT ANHEUSER-BUSCH, INC.'S OPPOSITION TO DERDERIAN'S AND DERCO'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION PURSUANT TO RULE 12(b)(1)

NOW COMES Defendant Anheuser-Busch, Inc., by its undersigned attorneys, and respectfully submits this Opposition to Defendants Jeffrey Derderian, Michael Derderian, and DERCO's ("Abstention Defendants") Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction Pursuant to FED. R. CIV. P. 12(b)(1).

In support hereof, Anheuser-Busch, Inc. relies on the accompanying Memorandum of Law.

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Respectfully submitted,

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Dated: September 22, 2003

CERTIFICATION

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V.	)	C.A. No. 03-335-L
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DEFENDANT ANHEUSER-BUSCH, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DERDERIAN'S AND DERCO'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION PURSUANT TO RULE 12(b)(1)

NOW COMES Defendant Anheuser-Busch, Inc., by its undersigned attorneys, and respectfully submits this Memorandum of Law In Opposition to Defendants Jeffrey Derderian, Michael Derderian, and DERCO's ("Abstention Defendants") Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction Pursuant to FED. R. CIV. P. 12(b)(1).

INTRODUCTION

This action arises from the February 20, 2003 fire at The Station nightclub in West Warwick, Rhode Island. The fire claimed victims from at least eight states, killing 100 and allegedly injuring an estimated 180 more. The fire was ignited by the band Great White when it used pyrotechnics indoors at The Station that night. Plaintiffs in this action include persons who allege they were injured in the fire, the estates of other individuals who allege that the decedents were killed in the fire, and others asserting consortium claims. Complaint. at ¶¶ 4 - 19. One plaintiff is a citizen of Florida and the remaining plaintiffs are citizens of Rhode Island. *Id.*

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 ("MMTJA" or "the Act") confers jurisdiction upon this Court to adjudicate this action. *See* Multiparty, Multiforum Trial Jurisdiction Act of 2002, Public Law 107-273, § 11020, 116 Stat. 1828 (2002).[1] The MMTJA resulted from Congress' multi-year efforts to adopt comprehensive legislation to allow all state and federal actions arising from accidents resulting in multiple deaths involving minimally diverse parties to be consolidated in a single federal court.

On September 8, 2003, Abstention Defendants filed their motion to dismiss. Conceding that the jurisdictional requirements of 28 U.S.C. § 1369(a) are satisfied, they argue that abstention is required under 28 U.S.C. § 1369(b). This Court must exercise its subject matter jurisdiction conferred by § 1369(a) and deny the motion because Abstention Defendants have not established (because they cannot) that abstention is required under § 1369(b).

ARGUMENT

I. The MMTJA Governs This Action

A. Purpose and Legislative History Of The MMTJA

Enacted by Congress in November 2002, the MMTJA is the culmination of a legislative process initiated years ago to craft comprehensive legislation to consolidate actions arising from deadly accidents into a single federal forum.[2] This Act and its

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1 The provisions of the MMTJA are codified at various sections of the Judicial Code. *See* 28 U.S.C. § § 1369, 1441(e), 1697, 1785, and 1391(g).

2 Legislation aimed at providing original federal court jurisdiction over actions arising from deadly accidents was first introduced during the 98th Congress of 1983-1984. The Conference Report accompanying the MMTJA notes that there is "ample
(continued...)

legislative history leave no doubt Congress intended the MMTJA to apply to an event just like The Station fire – one that produces "dispersed complex litigation arising out of a single accident resulting in multiple deaths or injuries." H.R. Conf. Rep. No. 107-685, at *199 (2002), *reprinted in* 2003 U.S.C.C.A.N. 1120, 1151 (attached to *Kingsley* Appendix, Exhibit A, at 9-10); *see also* H.R. Rep. No. 102-373, at *4 (1991) (legislation intended to deal with "problems of dispersed and complex litigation arising out of airline accidents, hotel fires and *other disasters in which many people are killed or seriously injured in a single accident*") (emphasis added) (attached to *Kingsley* Appendix, Exhibit B, at 16); H.R. Rep. No. 101-515, at 6 (1990) (noting legislation would apply to "limited context of cases arising out of single accidents in which many people are killed or injured") (attached to *Kingsley* Appendix, Exhibit C, at 33).

Keenly aware that "[a]ccidents of this nature can give rise to a multitude of suits[3] in Federal and State courts," Congress concluded that "under existing law, a variety of impediments exist to effective consolidation of these closely related cases." (*Kingsley* App. Ex. C, at 32). For example, "in the case of state court systems, the main impediments to effective consolidation are constitutional in nature," with "no single

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2 (...continued)
legislative history that preceded [the Act] from the 95th Congress through the 106th." H.R. Conf. Rep. No. 107-685, at ¶ 200 (2002), *reprinted in* 2003 U.S.C.C.A.N. 1120, 1152 (that portion of the Conference Report related to the MMTJA is attached as Exhibit A, at 10, to the Appendix filed in the related action, *Kingsley v. Derderian, et al.*, CA-03-208-L). As the legislative history is lengthy, only portions of that legislative history are cited herein. Copies of the cited material are attached as Exhibits to the *Kingsley* Appendix filed on August 14, 2003, and bates stamped for the Court's convenience.

3 The Conference Report accompanying the MMTJA states: "It is common after a serious accident to have many lawsuits filed in several states, in both state and federal courts, with many different sets of plaintiffs' lawyers and several different defendants." (*Kingsley* App. Ex. A, at 10).

state forum in which the contacts with all relevant parties [would be] sufficient to permit consolidation of all related litigation." *Id.* at 33. In the federal system, "[t]he requirement of complete diversity among the parties will frequently prevent all parties from getting into Federal court." *Id.* Congress determined that the critical public interests of conserving judicial resources, decreasing litigation costs, and reducing the risk of inconsistent adjudications would best be served by consolidation of these actions. *Id.* at 34. Congress ultimately discerned that "full consolidation cannot occur in the absence of federal legislative redress." (*Kingsley* App. Ex. A, at 11).

The MMTJA is that redress. It achieves full consolidation for qualifying cases through a series of related jurisdictional, removal, service and venue provisions which became law when Congress passed the MMTJA. First, 28 U.S.C. § 1369(a) expands the federal court's original subject matter jurisdiction to actions involving minimal diversity arising from a single accident resulting in the deaths of at least 75 persons. Second, 28 U.S.C. § 1441(e) authorizes the removal of § 1369 actions "both to invoke the proposed jurisdiction . . . and to join actions within the jurisdiction pending in the federal court." (*Kingsley* App. Ex. B, at 21). Specifically, § 1441(e) authorizes *a defendant* (singular) to remove an action which could have been brought in federal court under § 1369. *See* 28 U.S.C. § 1441(e)(1)(A). Congress expressly expanded the reach of removal declaring that a defendant may also remove an action, regardless of whether it could have been brought originally in federal court, provided the defendant is a party to an action which is or could have been brought under § 1369 and arises from the same accident as the action in state court. *See* 28 U.S.C. § 1441(e)(1)(B). Third, 28 U.S.C.

§ § 1697 and 1785 respectively authorize nationwide service of process and nationwide service of subpoenas in actions governed by § 1369. Finally, 28 U.S.C. § 1391(g) fixes venue in an action brought under § 1369 "in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place." 28 U.S.C. § 1391(g).

Congress passed the MMTJA to remove all impediments to full consolidation of cases arising out of qualifying accidents and thereby advance the critical public interests of conserving judicial resources, decreasing litigation costs and diminishing the risk of inconsistent adjudications. Concluding that federal court is the only forum where full and effective consolidation is achievable, Congress included provisions for nationwide service of process, nationwide service of subpoenas and expanded venue so that all parties could be joined and all evidence could be obtained in a single federal forum. Congress, therefore, intended not only to confer subject matter jurisdiction but also took affirmative steps to make the exercise of that jurisdiction likely. The MMTJA thus acts as a virtual magnet, drawing all civil actions arising from a qualifying accident into federal court, via the original subject matter jurisdiction conferred by § 1369, via a defendant's removal of a state court action which could have been brought under § 1369, and/or via a defendant's removal of an action based on that defendant's status as a defendant in a federal court action arising from the same accident.[4]

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[4] As the MMTJA took effect on January 31, 2003, litigation arising out of The Station fire appears to be the first to invoke its provisions. Accordingly, Anheuser-Busch has found no reported decisions interpreting § 1369 or the other provisions of the MMTJA.

B. This Action Fits Squarely Within The Jurisdictional Prerequisites Of § 1369(a)

This Court has subject matter jurisdiction over this action under § 1369. All of § 1369(a)'s jurisdictional requirements are satisfied because (1) this action arises from a single accident that resulted in the deaths of at least 75 natural persons; (2) minimal diversity between adverse parties exists as all but one of the plaintiffs are citizens of Rhode Island and at least one of the defendants is not, *see* Complaint, at ¶ ¶ 4 - 45; and (3) both § § 1369(a)(1) and (2) are satisfied (although only one need be). Section 1369(a)(1) is satisfied because at least one defendant resides in a state other than Rhode Island, the state where a substantial part of the accident took place. *See* Complaint, at ¶ ¶ 20 - 45. Section 1369(a)(2) is also satisfied because at least two defendants reside in different states. *Id.* Conceding that § 1369(a)'s jurisdictional requirements are satisfied, Abstention Defendants instead urge the Court to abstain from hearing the action, citing § 1369(b).

C. Abstention Is Not Required Under § 1369(b)

1. Abstention Defendants Have Not Met And Cannot Meet Their Burden Of Showing That § 1369(b) Abstention Is Required

As the parties urging this Court to abstain from exercising its jurisdiction, Abstention Defendants bear the burden of showing that § 1369(b) requires abstention. *See Renaissance Cosmetics, Inc. v. Dev. Specialists Inc.*, 277 B.R. 5, 14 (S.D.N.Y. 2002) (party seeking mandatory abstention under bankruptcy statute must show that all statutory requirements have been satisfied). That burden is a heavy one because abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 188 (1959) (holding district court could not abstain from exercising properly invoked diversity jurisdiction in state eminent domain case); *see also Buy-Rite Costume Jewelry, Inc. v. Albin*, 676 F. Supp. 433, 435-436 (D.R.I. 1988) (court has a "virtually unflagging obligation" to exercise its jurisdiction) (*quoting Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The language, history and purpose of the MMTJA confirm that Congress imposed a similar duty on federal courts to adjudicate mass tort cases like this one that present the danger of multiparty, multjurisdictional litigation. The abstention exception that Congress wrote into the MMTJA similarly must be interpreted narrowly and invoked rarely, with any doubts about its interpretation or invocation resolved in favor of the court exercising its Congressionally conferred subject matter jurisdiction under § 1369(a).

This case presents no doubts for the Court to resolve, however, because Abstention Defendants have not met, and indeed cannot meet, their burden. Section 1369(b) only applies to that narrow category of cases in which: "the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens."[5] 28 U.S.C. § 1369(b) (2003). These statutory terms must be construed so as to give effect to Congress' intent. *United States v. American Trucking Assn's*, 310 U.S. 534, 542 (1940); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999). Because Congress intended that all civil actions arising out of a qualifying accident be heard in a single federal forum rather than in a

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5 Section 1369(b) also requires that the claims asserted will be governed primarily by the law of that same state.

multiplicity of fora in various states, § 1369(b) can only be invoked when litigation ensues from a uniquely local accident. Abstention Defendants must therefore show that the "primary defendants" are citizens of the same state *and* are also citizens of the same state as a "substantial majority of all plaintiffs." They can do neither.

2. The Primary Defendants are Not Citizens of the Same State

The language of the MMTJA is plain, and this Court need not resort to the legislative history to determine that these actions should be in federal court. Though undefined in the MMTJA, the phrase "primary defendants" must be interpreted in a manner consistent with common understanding and effectuation of Congressional intent to provide full consolidation of qualifying cases absent a uniquely localized controversy. *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 223 (1st Cir. 2003) ("In discerning Congress's intent from the statute itself, [the court] attributes to words that are not specially defined in the text their ordinary usage . . . ."); *American Trucking Assn's*, 310 U.S. at 542 (statute should be interpreted to give effect to Congressional intent). In another context, the United States Supreme Court defined a "primary defendant" as one with a "dominant relationship to the subject-matter of a controversy." *United States of America v. American Tobacco Company*, 221 U.S. 106, 142 (1911). As the subject matter of the controversy here is The Station fire, the primary defendants are those with the dominant relationship to the events leading to the fire. At a minimum, those defendants include: (1) the parties responsible for starting the fire with their indoor pyrotechnics – the four surviving members of the band Great White and their tour manager Daniel Biechele ("Great White Defendants"); and (2) the owners of The Station – Jeffrey and Michael Derderian ("the Derderians") and DERCO.

Plaintiffs allege that Biechele, "and/or other agents of the band Great White, set up or set near the stage certain pyrotechnic devices," for use during the Great White concert. They further allege that Biechele "activated the pyrotechnic devices at, on, or near the stage" and that as a result, "sparks and/or flames flew from the device, igniting the foam insulation. . . causing a fire." Complaint, at ¶¶ 54, 56, 74, 76. Plaintiffs further contend that Biechele and the band members were negligent in, *inter alia*, their installation and use of "dangerous pyrotechnic devices." *Id.* at ¶¶ 176, 187. Based on these allegations, the Great White Defendants, all California citizens, *id.* at ¶¶ 28-34, are primary defendants because of their dominant relationship to the subject matter of the controversy – they started the fire.

Jeffrey and Michael Derderian are also primary defendants under § 1369(b). As the owners of the nightclub, they owed a duty of care to their patrons which plaintiffs allege was breached by, among other actions, allowing the use of pyrotechnics in the club without proper permits, failing to ensure that the foam insulation was fire resistant, allowing the club to become overcrowded, and failing to install sprinklers, emergency lighting, and lighted exit signs. *Id.* at ¶¶154 (a) - 154 (n). They are, therefore, parties with a dominant relationship to the subject matter of the controversy. The Derderians are citizens of Rhode Island. *Id.* at ¶¶ 24 - 26.

The Derderians agree that they are primary defendants, but their analysis stops short of its logical conclusion. Abstention Defendants' failure to include the Great White Defendants as "primary defendants" is a transparent attempt to avoid federal court by arguing that the parties responsible for starting the fire do not qualify as "primary defendants." The Court must reject this argument, as it lacks any logical or factual support.

The phrase "primary defendants" in this particular case also includes defendants with no culpability for causing the fire at The Station. Given the magnitude of the harm resulting from the fire, the practical reality is that the Derderians and the Great White Defendants lack the resources necessary to satisfy judgments likely to be entered against them in fire-related litigation. Plaintiffs asserting joint and several liability theories under Rhode Island law will ultimately seek to recover their damages from the remaining defendants named herein, including many non-Rhode Island corporate defendants. Thus, though not primary in terms of culpability, these defendants will likely be pursued as primary sources of recovery. Classifying these defendants as "primary" serves the MMTJA's goals by ensuring that litigation implicating the rights and interests of multiple out-of-state defendants remains in a federal forum. Therefore, those defendants likely to be pursued as primary sources of recovery should be deemed "primary defendants" for purposes of § 1369(b) in this case.

The lack of available resources from those defendants most culpable for the fire has been raised multiple times in the state court proceedings by Interim Lead Counsel Max Wistow as a justification for pre-suit discovery to identify additional defendants. For example, on May 1, 2003, Mr. Wistow advised Judge Gibney that it was "perfectly obvious, perfectly obvious that there is inadequate funds available from the obvious defendants." *See In re: The Station Fire in West Warwick, Rhode Island on February 20, 2003* transcript of May 1, 2003 hearing before Judge Alice B. Gibney at p. 38 (pertinent portions of said transcript are attached hereto as Exhibit A). Those "obvious" defendants, according to Mr. Wistow, include the Great White Defendants, the Derderians, American Foam Corp., Triton Real Estate and the Town of West Warwick. *See id.* at p. 37; *see also In re: The Station Fire in West Warwick, Rhode Island on February 20, 2003* transcript of March 28, 2003 hearing before Judge Alice B. Gibney at pp. 1-2 (pertinent portions of said transcript are attached hereto as Exhibit B) (noting that the obvious defendants "really are not going to be able to respond in a practical way to the tremendous, tremendous damages that are going to be available in a civil case").

While Anheuser-Busch is unaware of the amount of available funds from these defendants, Mr. Wistow has clearly concluded that whatever the amount, it will be inadequate to compensate those who have claims arising from the fire. According to Mr. Wistow, he expects that the so-called "obvious defendants" have, between them, a "grand total" of ten million dollars of insurance available for the several hundred lawsuits he anticipates will be filed as a result of the fire. *See* Ex. A, at p. 38. Accordingly, it is apparent that "Plaintiffs' Steering Committee" has determined that it must look elsewhere for sources of recovery.

The classification of "primary defendants" as those parties who are primary litigation targets (based on culpability or ability to pay, or both) is further supported by the House Judiciary Committee's interpretation of a similar abstention provision contained in the Class Action Fairness Act of 2002 ("CAFA") which was under consideration at the same time and by the same Congressional committee as the MMTJA. Though CAFA has not been enacted by Congress, the committee report provides insight about Congress' view of "primary defendants" as "those who are real 'targets' of the suit; that is, the parties that would be expected to incur most of the loss if liability is found." H.R. Rep. No. 107-370, at *30 (2002) (a copy of the relevant portions is attached as Exhibit D, at 47, to the *Kingsley* Appendix).

In summary, the primary defendants in culpability terms – the Great White Defendants (California citizens) and the Abstention Defendants (Rhode Island citizens) – are not citizens of the same state. The defendants most likely to be pursued as primary sources of recovery under theories of joint and several liability include many non-Rhode Island corporations. Therefore, Abstention Defendants cannot show that the primary defendants are citizens of the same state and § 1369(b) abstention cannot be invoked.

3. **The Substantial Majority Of All Plaintiffs Are Not Citizens Of The Same State**

Should Abstention Defendants somehow meet their burden of establishing that the primary defendants are all citizens of the same state, they must also establish that a "substantial majority of all plaintiffs" are citizens of that same state. The phrase "substantial majority of all plaintiffs" is not defined in the MMTJA and the Court must again look to the common usage of the terms and Congressional intent to guide its interpretation. *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d at 223.

The history and purpose of the MMTJA establish that Congress intended the phrase "substantial majority of all plaintiffs" to mean *virtually all plaintiffs*. The MMTJA and its legislative history evince overarching Congressional intent to consolidate *all* civil actions arising out of a qualifying accident into a single federal court. The abstention provision was a last minute addition[6] to the MMTJA, and the clear inference from the text of the Act and the circumstances surrounding its passage is that Congress

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6 The abstention provision was added "in an effort to develop greater [Senate] support . . . in the waning days of the 106th Congress." (*Kingsley* App. Ex. A, at 11).

intended the abstention provision to apply only to those rare instances where the governing law, the situs of the accident, the victims and the targets of the litigation all share the same state. Interpreting § 1369(b) to require that less than virtually all of the plaintiffs be citizens of the same state would circumscribe the subject matter jurisdiction by § 1369(a) in a manner not intended by Congress.[7] Such an interpretation would squarely conflict with the well established principle that abstention is a narrow exception to the court's "virtually unflagging responsibility" to exercise its jurisdiction.[8] *See Buy-Rite Costume Jewelry, Inc.*, 676 F. Supp. at 436.

The Judiciary Committee's Report on CAFA is further evidence in support of this interpretation. The Committee explained that under CAFA's proposed abstention provision, the "substantial majority of the members of the proposed plaintiff class" requirement must be read to mean "virtually all." (*Kingsley* App. Ex. D, at 46-47). By way of example, the report provides that "a proposed class of 1000 persons . . . presumably would fit this exception if 997 of those persons were . . . [citizens of the same state.]"

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7 Indeed, the whole point of the MMTJA was to avoid the situation in which there were lawsuits in various state and federal courts – which is precisely the situation here: 2 lawsuits in Massachusetts, 1 in Connecticut, and 6 in Rhode Island. The fact that there are lawsuits in Connecticut and Massachusetts is hardly surprising since the town of West Warwick is within miles of both state borders. The Derderians identify 57 Massachusetts residents and 9 Connecticut residents as victims of the fire. *See* Abstention Defendants' Memo, at 3.

8 This interpretation is also consistent with the principle of statutory construction whereby, when a statutory term is undefined, "[c]ourts are free to use standard dictionary definitions to assist in determining the ordinary meaning of statutory language." *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003, 1007 (1st Cir. 1995) (*citing FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). "Substantial" ordinarily means "considerable in quantity" and "significantly large." A "majority" is defined as "a number greater than half of a total." *Webster's Ninth New Collegiate Dictionary* (1986). Thus, taken together, a "substantial majority" must refer to an amount that is significantly larger than half of a total.

Id. at 47. Thus, under CAFA, a "substantial majority of all proposed class members" translates to 99.7%.

In these actions, a "substantial majority of all plaintiffs" are not citizens of the same state. Abstention Defendants contend that the phrase "all plaintiffs" must be construed to include all "fire victims." Abstention Defendants' Memo, at 11.[9] Assuming this to be correct, Abstention Defendants cannot meet their burden of showing that virtually all plaintiffs are citizens of Rhode Island, as they contend. The Station fire claimed victims from at least eight states. Of the 100 people killed, 41 were citizens of states other than Rhode Island. Various plaintiffs allege that over 180 more were injured in the fire and it is undisputed that many of the injured are also from states other than Rhode Island. Multiple Connecticut citizens have already filed suit in federal court there seeking recovery for injuries allegedly sustained by eight Connecticut citizens in The Station fire. *See Henault, et al. v American Foam Corp., et al.* The plaintiffs in the recently dismissed *Kinan* action (who will undoubtedly refile that case) are Massachusetts citizens seeking recovery for injuries allegedly caused by the fire. *See Kinan* Complaint, at ¶ ¶ 1, 2. Abstention Defendants identify 72 injured victims who are citizens of states other than Rhode Island; 57 from Massachusetts; 9 from Connecticut; 2 from California, 1

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9 In the *Passa* and *Kingsley* actions, where plaintiffs are allegedly Rhode Island citizens, Abstention Defendants initially contended that the phrase "all plaintiffs" means the plaintiffs in a particular action, and that the substantial majority of "all plaintiffs" are citizens of Rhode Island. However, in these actions and in the recently dismissed *Kinan* action, where the plaintiffs are not all Rhode Island citizens, Abstention Defendants argue instead that "all plaintiffs" meant *all* fire victims, presumably because under the interpretation they initially put forth in *Passa* and *Kingsley*, they could not argue for abstention. To interpret "all plaintiffs" to mean only the plaintiffs in a particular action is inconsistent with the MMTJA's intent to consolidate *all* actions arising from a qualifying accident in a single federal court.

Florida, 1 from Maine, 1 from Nevada; and 1 from Ohio. Abstention Defendants also identify another 73 individuals whose citizenship is alleged to be unknown. *See* Abstention Defendants Memo, at p. 3.

On the basis of this record, Abstention Defendants cannot show that the substantial majority of all plaintiffs are citizens of Rhode Island. Indeed, the record demonstrates that litigation arising from The Station fire is " . . . dispersed complex litigation arising out of a single accident resulting in multiple deaths or injuries," *see Kingsley* App. Ex. A, at 10 – exactly the type of litigation Congress intended the MMTJA to consolidate into a single federal court. This Court should therefore find that § 1369(b) does not require abstention and deny the motions.

Abstention Defendants ' contention can this Court can consider abstention on grounds other than § 1369(b), such as general principles of comity and federalism, is without merit and contrary to both the plain language of § 1369(b) and Congressional intent. In enacting the MMTJA, Congress specifically set forth the circumstances under which a court should abstain from exercising its jurisdiction, as conferred by § 1369(a). Those circumstances – as set forth in § 1369(b) – are the only circumstances under which the Court should abstain. Given the MMTJA's express abstention provision, common law principles of comity and federalism have already been accounted for in § 1369(b) and they do not provide a second bite at the abstention apple. In the event the Court determines that any of the common law abstention doctrines are applicable to an action under § 1369, Anheuser-Busch contend that Abstention Defendants have failed to meet their burden of establishing that any such doctrine applies, especially in the absence of "a similar action pending in a state court in which the controversy between the parties could be resolved." *Cioffi v. Federal Deposit Insurance Corp.*, 861 F. Supp. 2, 6 (D.R.I. 1994).

CONCLUSION

As the jurisdictional requirements of § 1369(a) are clearly met, this Court has jurisdiction over this action. Abstention Defendants have not met, and cannot meet their burden of establishing that § 1369(b) requires abstention. Accordingly, Anheuser-Busch, Inc., respectfully requests that this Court deny Abstention Defendants ' motion, exercise its jurisdiction, and adjudicate this case.

Respectfully submitted,

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Dated: September 22, 2003

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I hereby certify that on the 22nd day of September, 2003, I served a true copy of the within Opposition, via first class mail, postage prepaid to the following counsel of record:

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"A"

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

IN RE: THE STATION FIRE IN
WEST WARWICK, RHODE ISLAND
ON FEBRUARY 20, 2003

M.P. NO. 03-1326
M.P. NO. 03-1346
M.P. NO. 03-1171
M.P. NO. 03-1084

HEARD BEFORE THE HONORABLE ALICE BRIDGET GIBNEY ON

THURSDAY, MAY 1, 2003

03-241

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ORIGINAL

MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

CERTIFICATION

I, Mary M. Guglietti, hereby certify that the succeeding pages, 1 through 64, inclusive, are a true and accurate transcript of my stenographic notes.

MARY M. GUGLIETTI, RPR
Certified Court Reporter

plaintiffs will have to prove egregious fault on the town.

Assuming it does that, we have a grand total from those defendants of ten million dollars. It's perfectly clear that there's going to be something like 300 lawsuits. That means an average of $33,000 per lawsuit. If you add to that the State of Rhode Island as a defendant with its hundred-thousand-dollar cap, you end up with about $133,000 per lawsuit.

There were 99 deaths. Under Rhode Island law we have a statutory minimum. It is impossible, impossible, if there is negligence found on someone's part, for a recovery to be less than $250,000. And, indeed, that number, 250, will be woefully inadequate in most of the death cases.

On top of that are the horrendous burn cases, any one of which in the extreme are worth many millions of dollars themselves.

So it's perfectly obvious, perfectly obvious that there is inadequate funds available from the obvious defendants.

The promoters, so-called, Clear Channel, Anheuser-Busch, that have been sued in this case, no thorough investigation has taken place at this point. I've seen the complaint in Federal Court. It basically

"B"

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

IN RE: THE STATION FIRE IN
WEST WARWICK, RHODE ISLAND
ON FEBRUARY 20, 2003

M.P. NO. 03-1326
M.P. NO. 03-1346
M.P. NO. 03-1431

HEARD BEFORE THE HONORABLE ALICE BRIDGET GIBNEY ON

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MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

FRIDAY, MARCH 28, 2003

MORNING SESSION

THE COURT: Good morning.

AUDIENCE: Good morning, Your Honor.

THE COURT: Mr. Decof. Mr. Wistow.

MR. WISTOW: Good morning.

THE COURT: Good morning.

MR. WISTOW: I'd like to report to you what progress we've achieved so far.

As Your Honor knows, having been there this past Wednesday, the day before yesterday, many of the plaintiffs' lawyers, defense lawyers and experts were at the site.

And I can tell you that as a result of the review with our experts of what's there, we're frankly surprised at the wealth of material that remains at the site that needs to be preserved and explored further.

I should say, Your Honor, that no inference should be drawn that the Attorney General hasn't taken everything from the site that he may need for his criminal purposes.

Our purposes are different because in this case the obvious defendants, the ones that we think probably will be the subject of criminal, possible criminal prosecution, really are not going to be able to respond in a practical way to the tremendous, tremendous damages that are going to be available in a civil case.

So the plaintiffs' lawyers' principal responsibility is to try to see that their clients can be made whole as best that can be in this tragic situation. It's our obligation to explore possible defendants who the AG would not have within his sights for possible criminal prosecution.

The experts that we've been with on the site have encouraged us to believe that there is real reason to spend a great deal of time, effort and money in exploring further the potential liability of the many people that have not yet been named as defendants in any of the two cases that are pending.

We're particularly interested in removing and storing parts of the building, including parts of the structure. We're interested in wall coverings, insulation, parts of the floor, adhesives. And I don't mean to give an inclusive list, but that's the kind of thing that we're looking at.

All we're talking about today, Your Honor, is setting up a system that will preserve and shelter the material. We're not going to propose any kind of testing whatever this morning, destructive or otherwise. All we're talking about is getting the materials off of

And the entire thrust of what Messrs. Decof, Mandell and I were trying to do in our exercise was to isolate and determine which manufacturers should be sued because we believe, and I think with good reason, that the manufacturers will be the key to this case. And let me explain why that is, Your Honor.

There are certain defendants who just jump out at one, I mean, it's -- the Derderians are so obvious that they needn't be mentioned. The Derderians have one million dollars worth of insurance.

The distributor of the foam, not the manufacturer, the distributor of the foam, American Foam, has five million dollars of insurance.

The band, to the best of our knowledge, at this point is substantially judgment-proof.

Triton Real Estate, the owner of the premises, has no insurance and, in fact, has recently instituted lawsuits against insurance companies claiming that it has insurance and alleging that the insurance companies have said there is no insurance.

The town, West Warwick, has four million dollars worth of insurance. And, indeed, even to get to that four million dollars worth of insurance, if the Public Duty Doctrine is -- I shouldn't say if it's invoked, it will be invoked -- if it's upheld to apply, then the